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Cases of Note: Sometimes It's Not a Federal Action #2

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LEGAL ISSUES

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Cases of Note — Sometimes It's Not a Federal Action #2

Column Editor: **Bruce Strauch** (The Citadel) <strauchb@citadel.edu>

LARRY MONTZ V. PILGRIM FILMS & TELEVISION ET AL., UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, 649 F.3d 975; 2011 U.S. App. LEXIS 9099.

Yes, it's the old how do you pitch an idea and not have it stolen? Well, it depends on trust, which is in short supply in Hollywood. A copyrighted script is protected, but the core concept can be ripped off and handed to word processor galley slaves to write anew.

The Supreme Court of California tried to do the honorable thing in 1956 and recognize an implied contractual right to compensation. ***Desny v. Wilder***, 46 Cal.2d 715, 299 P.2d 257 (Cal. 1956). The "Desny claim" has remained alive for over fifty years. ***Grosso v. Miramax Film Corp.***, 383 F.3d 965 (9th Cir. 2004). Of course, it requires an expectation on both sides that compensation will flow if a concept is used. But it's hardly likely the author intended it as a gift. And most importantly, it is not preempted by federal copyright law.

So, Let's Go to the Facts of the Case

Yes, it's the old paranormal field investigator shtick. Is there nothing original in Hollywood?

Parapsychologist **Larry Montz** dreamed up a TV show that would follow his crack team on field investigations. You know, temperature drops in a room without reason. Photos of ghosts. **Jack Nicholson** smashes down hotel doors with an axe. Well, not that extreme. But you get the idea.

And they would have all kinds of cool gear. Magnetometers and infrared cameras. That kind of stuff to really add to the pseudo-scientific vibe.

From 1996 to 2003, **Montz** tirelessly pitched the idea to studios, producers and other suits. Took meetings. Held discussions. Included in this was **NBC** and the **Sci-Fi Channel**. Meh. No interest.

Then in 2006, *Ghost Hunters* appeared produced by a partnership of **NBC** and **Craig Piligian** as **Pilgrim Films**. **Joseph Conrad Hawes** and his crack team, armed with cool gear, travel America on paranormal field investigations.

Montz understandably felt ripped off, and so he sued. And **Montz'** lawyer had read up on ***Desny*** and specifically alleged breach of an implied-in-fact contract. Plus, the ideas were pitched with the understanding that they were confidential and would not be used or disclosed without compensation.

You can see where under copyright law there would be an issue of whether there was anything the least bit original about ghost hunters with cool gear.

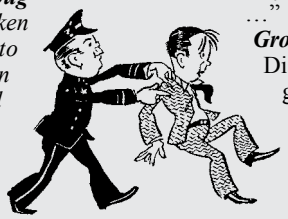
Procedural fol-de-rol

Montz lost based on copyright law preempting state-law claims. He appealed and lost again before a three-judge panel. The Ninth Circuit ordered a rehearing *en banc.* Woo. All the black robes crowd in to consider the issue.

Getting on all Fours with the Industry

Writers pitch scripts to the movies and TV all the time. Ideas are not protected under copyright, but a studio can violate an implied contract to pay the writer. In ***Desny*** — a writer — **Victor Desny** — entered into an implied contract with the famed director **Billy Wilder** (*Sunset Boulevard, Witness for the Prosecution, The Lost Weekend)*. **Wilder** produced *Ace in the Hole* about a man trapped in a cave. The California Supreme Court held that ***Desny*** had sufficiently pled breach of an implied contract.

*So how interesting is that as a plot? Not terribly. So **Wilder** made **Kirk Douglas** into an unscrupulous, drunken reporter who bribes a sheriff to go slow on the rescue to maintain a media feeding frenzy. And **Douglas** has an affair with the caveman's wife, **Jan Sterling**, who wants out of their shabby trading post/café in the middle of Nowheresville, New Mexico, thus lending a film noir allure to it. The caveman dies due to laggardly rescue. **Jan** stabs **Kirk** to death with pair of scissors.*



*Yes, it was a flop. **Wilder** made $250,000. This was 1951, when the dollar bought something. **Desny** settled for $14,350.*

Copyright Preemption

The ***Copyright Act of 1976*** expressly preempts state claims if the work falls within the subject matter of copyright and state law provides rights that are equivalent. 17 U.S.C. § 301(a). But, of course, copyright does not apply to ideas not in a fixed medium. § 301(b). If the idea is in a fixed medium, then it's preempted. *See* NIMMER, NIMMER ON COPYRIGHT § 19D.03[A][3] (rev. ed. 2010).

To escape preemption, state law must provide rights that are qualitatively different from copyright. With implied-contract, there is an extra element — payment for use of an idea. *See* ***Rokos v. Peck***, 182 Cal. App. 3d 604, 617 (1986). Further, copyright is a public monopoly while implied-in-fact contracts are between two parties. ***Rokos***, 182 Cal. App. 3d at 617.

"The whole purpose of the contract was to protect Plaintiff's rights to his ideas beyond those already protected by the ***Copyright Act*** …" ***Groubert v. Spyglass Entm't Group***, No. CV 02-01803, 2002 U.S. Dist LEXIS 17769, 2002. And by golly, **Nimmer** expressly said this was a sound ruling because otherwise there would be a gap between copyright protection and industry custom.

Questions & Answers — Copyright Column

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QUESTION: What does the 11th Circuit ruling in the Georgia State University case mean for libraries?

ANSWER: The **GSU** case is not over but continues to work its way through the judicial

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